Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1241

MID-AMERICA TRANSPORTATION COMPANY, INC.,
Petitioner,

vs.

NATIONAL MARINE SERVICE, INC.,
and
M/V NATIONAL PROGRESS, HER ENGINES, BOILERS, ETC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
Eighth Circuit

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To the United States Court of Appeals
Eighth Circuit

The Petitioner, Mid-America Transportation Company, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Eighth Circuit Court of Appeals, and its denial of a petition for rehearing, entered December 3, 1975.

OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals and the denial of the petition for rehearing, reported at — F2d — (1975), appears in the Appendix hereto. In that opinion, the

Eighth Circuit Court of Appeals rendered judgment in favor of respondent and affirmed a judgment entered by the United States District Court for the Eastern District of Missouri. Subsequently, upon timely filing of a petition for rehearing, the Eighth Circuit Court of Appeals denied said petition on December 3, 1975.

JURISDICTION

The opinion of the Eighth Circuit Court of Appeals was entered November 11, 1975. A timely petition for rehearing was filed and denied by the Eighth Circuit Court of Appeals on December 3, 1975, and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the respondent motor vessel sustained its burden of going forward with evidence to rebut the presumption of its negligent towage which arose as a result of grounding a barge in her tow?

2. May the towing vessel rebut the presumption of negligent towage by merely professing ignorance of a grounding or of the cause of the grounding of an unmanned and unpowered barge in its tow when the physical evidence on the bottom of the barge is conclusive, and the District Court so found, that the barge had been grounded while in tow of the motor vessel?

3. Has the towing vessel adduced testimony of a non-negligent explanation of the grounding by adducing testimony that the towing vessel's pilot "pray to God" he was in the channel at the time of the grounding yet recalls nothing of any grounding?

4. Upon evidence of a grounding is the burden on the towing vessel to explain where and upon what its unmanned, unpowered and captive tow was at the time of the grounding of that tow?

STATEMENT OF THE CASE

Petitioner, Mid-America Transportation Company, Inc., as owner of Barge MAT-75 filed the instant suit against respondent National Marine Service, Inc., in personam, as owner and operator of the M/V NATIONAL PROGRESS, and against the M/V NATIONAL PROGRESS, her engines, boilers, etc. in rem in the United States District Court in admiralty, to recover damages sustained to barge MAT-75 when she was grounded while in tow of defendant M/V NATIONAL PROGRESS.

The matter was first tried on May 3, 1972. At that trial Petitioner showed a grounding of barge MAT-75 from the physical evidence on the barge. Petitioner relied on the presumption of negligent towage arising from the grounding; Respondent did not on that trial go forward with any evidence to rebut that presumption. The testimony did not disclose where, when or how the barge grounded. The District Court found that MAT-75 had been grounded, but held that petitioner failed to prove its case, and rendered judgment in favor of respondents and against petitioner. *Mid-America Transportation Company, Inc. v. National Marine Service, Inc., et al.*, 356 F.Supp. 1358. Petitioner appealed that adverse ruling to the Eighth Circuit Court of Appeals, which, on June 12, 1974, reversed in part holding that a presumption of negligent towage applied and remanded the cause to the District Court for further proceedings to give the respondent tug an opportunity to rebut the presumption of negligence raised by the grounding. *Mid-America Transportation Company, Inc. v. National Marine Service, Inc., et al.*, 497 F2d 776.

On January 27, 1975, pursuant to mandate of the Eighth Circuit Court of Appeals, additional proceedings were held where Respondent was given an opportunity to meet the burden so imposed. At that hearing, Respondent introduced the deposition testimony of Pilot S. P. Crawford, together with the live testimony of its expert, Ralph Clark.

Pilot Crawford's testimony basically was that in the early morning hours of September 30, 1970, the day the grounding occurred, he was the pilot aboard the M/V NATIONAL PROGRESS. Petitioner's MAT-75 was in tow of the M/V NATIONAL PROGRESS and the M/V NATIONAL PROGRESS was proceeding down the Mississippi River. Pilot Crawford came on duty at midnight, September 29th and worked until 6:00 A.M., September 30th. He piloted the Motor Vessel and tow through lock No. 19, and cleared the lock at 1:00 P.M., September 30, 1970. Sometime within an hour after departing the lock, Pilot Crawford alerted Captain Self and Mate Schubert of the fact that MAT-75 was riding lower in the water than the other barges in tow. No entries were made in the Motor Vessel's logs of the grounding, nor were any entries made in the logs relating to the fact that the barge was found to have taken on sufficient water to cause it to sink, although the pilot testified he normally logged such events.

From the time he came on watch at midnight, until the time he noticed the sinking condition of the MAT-75, as far as Pilot Crawford knew, the motor vessel and tow remained in the navigable channel. He was not aware of any known or marked obstruction inside the channel.

Pilot Crawford failed to testify, however, where, when or how the barge grounded. His testimony amounts to a "no grounding" defense. The tug failed to adduce evidence of any type which in anyway explained the grounding. In fact respondent still controverted the District Court's original finding of fact, 356 F.Supp. at 1361:

> "These injuries to the barge were caused by its having been grounded while in the tow of the M/V National Progress. This grounding occurred between midnight on September 29, 1970, and 1:00 a.m. to 1:30 a.m. on September 30, 1970."

The tug offered also the testimony of Clark, its expert. He testified that the holes which were caused by the grounding and which were found in the hull of the MAT-75 upon drydocking, would have caused the wing bouyancy tanks to fill with river water in less than one hour, and probably in 15-20 minutes.

FEDERAL JURISDICTION

This is an admiralty and maritime matter within the meaning of Rule 9(h) Fed. Rules of Civil Procedure and the Federal District Court has jurisdiction pursuant to 28 U.S.C. § 1333(1).

REASONS FOR GRANTING THE WRIT

I. The Decision and Opinion of the Court of Appeals Conflicts with Opinions Rendered in This Court in The Steamer Webb, 81 U.S. (14 Wall.) 406 and in Other Circuits Bisso v. Waterways Transportation Co., 235 F.2d 741 (5th Cir. 1956).

The law is well settled that where a stranding takes place while the towing vessel is passing through a well-known channel without any unusual interference with her navigation, the stranding is presumptively due to negligence rather than to a danger in navigation.

In *The Steamer Webb*, 81 U.S. (14 Wall.) 406, 20 L.Ed. 774, (1871), the Steamer Webb permitted her tow to ground and become damaged. This Court held, l.c. 414-415:

> "In the present case the departure from the true course was not so great, but it was enough to devolve upon the tug the duty of explanation.
>
> * * * * * * * *
>
> Certainly this is enough to impose upon the tug the necessity of explaining how she came to be so far off her course in running so short a distance. We do not say that in order to excuse her it must be shown the accident was inevitable, but it ought to appear that so remarkable a deviation from her correct course, made so soon after leaving Handkerchief Light, was consistent with cautious and skilful management.
>
> * * * * * * * *
>
> The excuses set up in behalf of the steamer are that the night was foggy and dark, and that the currents were variable, conflicting, and imperceptible."

As stated in *Sanders v. Meyerstein*, 124 F. Supp. 77, 82 (E.D. N.C. 1954):

> "In a case such as this, where the towed vessel is unmanned, the tower is clearly and solely responsible for the safe navigation of the tug and tow. The tower is always charged with responsibility for knowledge of the conditions of navigation in the waters where the tug operates, including knowledge of channels, depth of water, obstructions, shoals and other dangers known generally to men experienced in navigation. . . . Although an injury to the tow raises no presumption of fault on the part of the tug . . . the cases hold that evidence of grounding of a barge or other vessel in tow of a tug establishes a prima facie case of negligence on the part of the tug. The Reichert Line, 2 Cir. 64 F.2d 13; The Anaconda, 4 Cir., 164 F.2d 224; The Evelyn Gregory, 4 Cir., 170 F.2d 899."

As the Eighth Circuit Court of Appeals held in the prior appeal herein, upon proof of the grounding of the unmanned and unpowered tow, "the tug is charged with the duty of producing evidence that her fault did not cause the grounding." *Mid-America Transportaton Company, Inc. v. National Marine Service, Inc., et al.*, 497 F.2d 776, 780 (8th Cir. 1974).

Once the presumption of negligent towage on the part of the tug is established, the burden shifts to the tug to explain the accident. The extent to which the burden has shifted to the tug, was aptly stated in *Humble Oil & Refining Company v. Tug Crochet*, 422 F.2d 602, 606 (5th Cir. 1970):

> "While a tug is not an insurer of its tow nor generally subject as a bailee to any presumption of fault, when she strands her tow under circumstances which ordinarily result in no such casualty, she had the burden of producing evidence *which shows a reasonable excuse other than her own negligence.*" (Emphasis added)

Similarly, in *Brown and Root, Inc. v. American Homes Assurance Company*, 353 F.2d 113 (5th Cir. 1965), that court ad-

dressed itself to the question of the tug's burden in a grounding case. It held, l.c. 177:

> "One, of course, is the burden resting on the tug to come forward with a *plausible explanation* for having stranded during calm weather on a clear night in a waterway having over 150 feet of navigable channel." (Emphasis added)

Application of the burden of explanation has best been stated in *Bisso v. Waterways Transportation Company*, 235 F.2d 741 (5th Cir. 1956). In stating the tug's burden in refuting the presumption, the Court held, l.c. 741:

> "This brought into play the sensible rule that, even though the engagement is in contract so that the duty of the tug toward the tow is that of due care only, with the consequent burden on the tow of establishing negligence, Stevens v. The White City, 285 U.S. 195, 52 S.Ct. 347, 76 L.Ed. 699; New Orleans Coal & Bisso Towboat Co. v. United States, 5 Cir., 86 F.2d 53, 1937 A.M.C. 86, certiorari denied St. Paul Fire & Marine Ins. Co. v. New Orleans Coal & Bisso Towboat Co., 300 U.S. 676, 57 S. Ct. 669, 81 L.Ed. 881; Stall & McDermott v. Southern Cross, 5 Cir., 196 F.2d 309, 1952 A.M.C. 876; The Clarence L. Blakeslee, 2 Cir., 243 F. 365, a stranding which occurs under circumstances which ordinarily results in no such casualty puts on the tug the obligation of some satisfactory explanation. 'When an accident occurs to the tow the action is ex delicto and the burden is on the tow to show negligence on the part of the tug. However, circumstances may create a strong presumption of negligence. In that event the burden is on the tug to rebut the prima facie case or, at least, to show a reasonable excuse for the accident other than its own negligence. The Steamer Webb, 14 Wall. 406, 20 L.Ed. 774; The Clarence P. Howland, 2 Cir., 16 F.2d 25', Simkins v. R. L. Morrison & Sons, 5 Cir., 107 F.2d 121, 122, 1940 A.M.C. 24; The Marie Palmer, D.C.E.D.Ga., 191 F. 79, 86, affirmed per curiam

5 Cir., 202 F. 1023. 'The burden of explanation was cast upon the tug to account for this apparently unnecessary grounding. The tug proved no fault in the management of the schooner, and gave no reasonable explanation why she did not keep the schooner under control. Upon this showing alone the libelant was entitled to a decree for damages', Burr v. Knickerbocker Steam Towage Co., 1 Cir., 132 F. 248, 250. 'The grounding of the tow called for an explanation. The attempted explanation was the presence of a dense fog, but the tug had to meet the prima facie proof of fault occasioned by grounding her tow by showing not only that she was in a troublesome fog, but that her master did everything a skillful navigator should have done while in a fog to keep the tow in line and to keep it from sagging into the shore as it rounded the bend in the river and was subjected to the impact of an ebb tide.' The Stirling Tomkins, 2 Cir., 56 F.2d 740, 742, 1932 A.M.C. 447; The Reichert Line, 2 Cir., 64 F.2d 13, 14, 1933 A.M.C. 785; The Evelyn v. Gregory, 4 Cir., 170 F. 2d 899, 901, 1949 A.M.C. 22; The Anaconda, 4 Cir., 164 F.2d 224, 228, 1947 A.M.C. 1658; Coastwise Transportation Corp. v. United States, D.C.S.D.Me., 43 F.2d 401, 404, 1930 A.M.C. 1689."

Thus, the tug has the duty of adducing evidence, negligent or non-negligent, of WHY the grounding occurred. In this instance upon rehearing of this case before the District Court, — F.Supp. — (E.D. Mo. 1975), the essence of the tug's testimony before the District Court was:

1. The pilot on watch "pray to God" he was navigating in the channel with petitioner's barge in tow and that there were no obstructions to navigation known to him in the channel, and
2. The incident preceding the grounding when the tow "rubbed" a protection fender at a railroad bridge would not have caused the damages sustained to the barge.

The point in issue, and which the tug has the burden of showing, is where the tug was navigating at the time of the grounding. In that regard, there is absolutely no explanatory evidence, either of a negligent or non-negligent nature, of what the barge struck, where the tow was when it struck that object, and why it struck that object. The explanation, as required by *The Steamer Webb*, supra, and *Bisso v. Waterways Transp. Co.*, supra, has yet to be heard.

As exhibited by the deposition testimony of Pilot Crawford:

> "Mr. Faerber: Did Captain Self tell you whether he struck an obstruction, known or unknown, during that trip?
>
> Mr. Herron: With that barge?
>
> Mr. Faerber: With any barge in the tow.
>
> A. No, we didn't discuss that. We went over the possibilities of where it could have happened at, you know, after we found out.
>
> Q. What were the possibilities? A. And we couldn't come up with anything at the time.
>
> Q. When was that discussion? A. I can't recall what day it was. It must have been on September the 30th, I think, or something or other. When we find something like that we try to determine something or another what caused the situation."

By the defendant's own witnesses' testimony, defendant has still not furnished the court with an exculpatory explanation for the grounding.

II. This Case Presents an Opportunity to This Court to Insure the Uniform Application of Fundamental Principles of Admiralty Law in Grounding Cases on the Inland Waterways of the United States.

As this Court set forth in *The Steamer Webb*, supra, upon the happening of certain events in an admiralty action, the "duty of explanation" arises making it incumbent upon the towing vessel to explain why the accident happened and that its cause was consistent with caution and skillful management of the tow. Judge Learned Hand similarly stated the same principle in *Sternberg Dredging Co. v. Moran Towing and Transp. Co.*, 196 F.2d 1002, 1006 (2nd Cir. 1952):

> "It is often a controlling factor in deciding where to throw the burden of producing evidence—and obviously it ought to be—that the proper party to charge is he who alone could discover the truth."

In the previous ruling of the Eighth Circuit Court of Appeals, 497 F.2d 776, the Court reversed the District Court's decision in favor of the tug (356 F.Supp. 1358), relying upon this Court's opinion in *The Steamer Webb*, supra, and held that "the tug is charged with the duty of producing evidence that her fault did not cause the grounding."

At the retrial, pursuant to the mandate of the Court of Appeals, no evidence whatever was adduced of any explanatory nature. In affirming that the tug had nevertheless sustained its duty of explanation, the Eighth Circuit Court of Appeals completely disregarded the application of the principles this Court set down in *The Steamer Webb* and that the other Circuits have always adhered to. Moreover, it requires little imagination to foresee the effects of the Court's ruling: in the Eighth Circuit (which encompasses major portions of the Mississippi and Missouri Rivers and portions of the Illi-

nois River) the presumption of negligent towage which arises from a grounding can be rebutted simply by the testimony of the pilot of the motor vessel that his tow was in the channel and to confess ignorance that a grounding occurred, all in the face of the physical evidence of grounding found on the barge. In other Circuits, as in the Fifth Circuit (*Bisso*, supra), the tug is under "the obligation of some satisfactory explanation" (235 F.2d at 741), or must "come forward with a plausible explanation for having stranded." *Brown & Root, Inc. v. American Homes Ass. Co.*, supra.

As set out in *The Reichert Line*, 64 F.2d 13, 14 (2 Cir. 1933), the rebuttal of the presumption requires that the tug explain "that the grounding and consequent damage were not due to fault on her part." In the Eastern District of New York, in *Geo. W. Rogers Construction Corp. v. Tug Ocean King*, 252 F.Supp. 657 at 659, the presumption places

> "the burden . . . on the tug to rebut the prima facie case or, at least, to show a reasonable excuse for the accident other than its own negligence."

If, as held by the Eighth Circuit, the only evidence required from the motor vessel is that the tow was in the channel and ignorance of any grounding, the presumption which arises as a result of the clear evidence of grounding damage to the barge will necessarily become a sham and an invitation for hazy recollections and unentered events in motor vessel logs. The evidence required to rebut the presumption must be more than the bare testimony of an obviously interested witness of the party which is adduced by deposition so that the trial court does not even have the benefit of evaluating the personal appearance or credibility of the witness who merely denies a grounding.

The principles involved in grounding cases are set forth by the Eighth Circuit in its opinion: l.c. — F2d at — (appendix A-1):

> "It was conceded that if the grounding took place outside the channel or on a known obstruction in the channel that the tug was liable. On the other hand, if the grounding took place on an unknown object in the channel the tug owner was not to be presumed negligent."

Upon adducing evidence of a grounding, it is presumed that the tug was negligently navigated and the barge was grounded as a result of negligent navigation. In that event, absent a plausible non-negligent explanation the tug would be liable. The barge owner has no personnel aboard its barge and accordingly has no way of identifying the object upon which its barge was grounded.

In the present suit, and the point of the entire suit, is that there was *absolutely no evidence from those in the best position to testify as to*:

1. What the barge struck;
2. Where the tow was when it struck that object; and
3. Why it struck that object.

The tow, completely at the mercy of the tug because its barge is unmanned and has no way to adduce evidence of what, where and why the tow grounded, is aided in recovery, and the presumption of negligent towage arises against the tug upon a showing of a grounding. The physical evidence of the grounding damage to the hull of the towed vessel would not ordinarily occur absent the negligence of the motor vessel in either navigating outside of the channel or in hitting a known obstruction. The tug, to overcome the presumption must respond with evidence of non-culpable conduct on its part, and mere deposition testimony that no grounding occurred does not constitute such evidence.

The burden which is placed on the towed vessel in the Eighth Circuit, unlike the Second and Fifth, is not in accordance with

the first decision (497 F.2d 776). In essence, the Court has required the barge owners to maintain a crew to travel on the barge and to be available at all times to adduce testimony of the cause of the grounding should one occur. Since such is impossible, the presumption of negligent towage in grounding situations has arisen. The tug must be accountable in groundings to explain where she was at the time of the grounding and upon what she grounded. This Court must insure that the accounting which the barge is required to give is uniform within the circuits and meets some reasonable and plausible standard.

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit Court of Appeals.

Respectfully submitted

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APPENDIX

United States Court of Appeals for the Eighth Circuit

No. 75-1236

Mid-America Transportation Company, Inc., Appellant, v. National Marine Service, Inc., et al., Appellees. } Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: October 17, 1975

Filed: November 11, 1975

Before Clark, Associate Justice,* Lay and Ross, Circuit Judges.

Per Curiam.

This admiralty case is before this court for the second time. In our original opinion we remanded to the trial court for further evidence and determination in keeping with the views expressed therein. *Mid-America Transportation Co., Inc. v. National Marine Service, Inc.*, 497 F.2d 776 (8th Cir. 1974).

No useful purpose would be served in again setting forth the facts in detail since that has already been accomplished by Judge Talbot Smith in our prior decision. *Id.* Suffice it to say that plaintiff's barge was damaged while in the tow of a tug owned by the defendant. Judge Wangelin originally found that the damage occurred during a grounding of the barge, but held that the barge owner had not proved negligence on the part of the tug since it had not proved either when or where the grounding took place.

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* Associate Justice Tom C. Clark, United States Supreme Court, Retired, sitting by designation.

It was conceded that if the grounding took place outside the channel or on a known obstruction in the channel that the tug owner was liable. On the other hand, if the grounding took place on an unknown object in the channel the tug owner was not to be presumed negligent. In our original opinion, we held that the fact that the barge was shown to have been damaged by grounding was sufficient to require ". . . the tug to come forward to establish that she was in the channel and did not hit a known obstruction therein *or* to furnish other exculpatory explanation . . ." (Emphasis supplied.) *Id.* at 780. We thereupon directed

> further proceedings at which the tug will be given an opportunity (subject to rebuttal by the barge) to carry such burden. If it fails to do so, the District Court may draw an inference of fact unfavorable to it. On the other hand, if the tug does come forward with evidence sufficient to cast doubt upon the validity of the inference arising from the facts, the barge will not have sustained the burden of ultimate persuasion resting upon it from the start.

Id. at 780-781.

On rehearing the defendant tug owner presented the deposition testimony of one Crawford, the pilot at the time the damage occurred. He testified that as far as he knew the barge was within the channel when the damage occurred and that there was no obstruction in the channel of which he was aware. The plaintiff presented no evidence to show that at the time of the grounding the barge was outside the channel nor that there were any known obstructions in the channel in the stretch of the river where the grounding occurred. After receiving this additional evidence Judge Wangelin found that the ". . . defendants produced sufficient evidence to establish that the M/V National Progress and its tow were in channel and did not hit a known obstruction while within the channel." *Mid-America Transportation Co., Inc., v. National Marine Service, Inc.*, No. 71 A 692(3) (E.D. Mo., filed Mar. 5, 1975).

Based upon our independent review of the evidence this finding of fact is not clearly erroneous. In making such finding, Judge Wangelin clearly complied with the law of the case as hereinbefore quoted from our original opinion. The judgment of the trial court is therefore affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

United States Court of Appeals for the Eighth Circuit

75-1236 September Term, 1975

Mid-America Transportation Company, Inc., Appellant, vs. National Marine Service, Inc., et al., Appellees.	Appeal from the United States District Court for the Eastern District of Missouri.

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

December 3, 1975